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MICHAEL RODAK, JR., CLERK

**In the
Supreme Court of the United States**

OCTOBER TERM, 1977

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA; LOCAL 705, INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSE-
MEN AND HELPERS OF AMERICA, AND LOUIS PEICK,**
Petitioners,

vs.

JOHN DANIEL,
Respondent.

On Petitions for Writs of Certiorari to the United States Court
of Appeals for the Seventh Circuit

**BRIEF OF RESPONDENT JOHN DANIEL
IN REPLY TO
AMICUS CURIAE MEMORANDUM OF THE
UNITED STATES**

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**In the
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OCTOBER TERM, 1977

Nos. 77-753 and 77-754

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF
AMERICA; LOCAL 705, INTERNATIONAL BROTHER-
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**BRIEF OF RESPONDENT JOHN DANIEL
IN REPLY TO
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UNITED STATES**

The United States has filed an *amicus curiae* memo-
randum in support of the petitions for a writ of certiorari
subsequent to the filing of the Respondent's Brief in opposi-

tion to such petitions. Because no persuasive reasons are set forth in the *amicus curiae* memorandum for granting certiorari, the Respondent now files this supplemental brief in reply to the *amicus curiae* memorandum. Supreme Court Rule 24(5).

The United States sets out two reasons in support of the petitions for a writ of certiorari. First, the Department of Labor, the Department of the Treasury, and the Pension Benefit Guaranty Corporation are said "to believe" that the decision below "will substantially affect the execution of their statutory responsibilities." U.S. Br. at 2. However, such a belief—set out in a mere conclusory fashion—has no grounding in fact. The *amicus* memorandum cites no statutory responsibilities of the Departments of the Treasury and of Labor or of the Pension Benefit Guaranty Corporation which will be affected by the decision below. Indeed, no statutory responsibilities of any sort of these government departments and agency are referred to. The only statute outside of the securities area referred to in this context is the Employee Retirement Income Security Act of 1974 ("ERISA") which *admittedly* "did not take effect until January 1, 1975, . . . and thus did not apply to this case . . ." U.S. Br. at p. 4 n.3 (emphasis added). ERISA is thus not at issue here,¹ and it cannot bring this case within the certiorari jurisdiction of the Court.

The *amicus* memorandum also expresses a concern that the decision below "has left [pension plan] administrators

¹ Even were ERISA applicable here, it would not immunize petitioners from liability under the antifraud rules of the federal securities laws because there is no conflict between ERISA and the federal securities laws. See Brief of Respondent at pp. 37-39. This is also the conclusion of the court of appeals below in dictum. See Pet. Local 705 App. pp. 42-48.

. . . in considerable uncertainty as to possible liability which may arise from their past, as well as their future, conduct . . ." U.S. Br. at 4. If this is a concern over the extent of possible damages, it is a question not now before the Court. A finding of liability in a securities fraud case is unrelated to a determination of the appropriate remedy. *Mills v. Electric Autolite Co.*, 396 U.S. 375, 386 (1970); *J. I. Case v. Borak*, 377 U.S. 426, 433 (1964).

If this is a concern over the breadth of possible liability for past or future misrepresentations, it is also misplaced. The decision below merely holds that the plaintiff has stated a claim on which relief *could* be granted. However, in order to prevail the plaintiff must clear the statute of limitations bar, and prove up the elements of a cause of action under the antifraud rules—including, for example, the existence of a false or misleading material statement, causation, damages, and intent to defraud.² *Ernst and Ernst v. Hochfelder*, 425 U.S. 185 (1976). Indeed, it is the presence of scienter

² These limitations have been expressly recognized by the court of appeals below:

"[P]lan liability, given the fact that employees' interests in pension funds are covered by the anti-fraud provisions of the securities acts, is still limited by a number of factors. Particular employees must show, in light of all the ambient circumstances, justifiable reliance on a material misrepresentation or omission causing them injury. If all material facts are disclosed in a manner comprehensible to the average worker, as in any other securities fraud case, no damage causation will exist under the securities laws . . . In addition, other pension funds may be immunized by the applicable statute of limitations. These considerations, as well as others, may arise here and in future cases as constraints on plan liability." Pet. Local 705 App. pp. 50-51.

and the egregiousness³ of the securities fraud that distinguishes the Teamster pension funds in this case. This has been expressly recognized by the Chairman of the Securities and Exchange Commission.

"I appreciate your concern about the threat of lawsuits asserting liability for past events, but, honest plan sponsors, who have operated pension plans honestly, need not fear retroactive liability under the anti-fraud provisions of the federal securities laws." Letter from SEC Chairman Williams to Senator Williams dated January 5, 1978.

There is just no evidence of any sort that other non-Teamster pension funds have engaged in the type of intentional securities fraud complained of here.

The *amicus* memorandum neglects to point out that the antifraud provisions of the federal securities laws do *not* establish a system of affirmative disclosures to investors; they are merely a direction not to be deceptive or misleading.⁴ U.S. Br. at p. 3 n.2. Neither does the *amicus*

³ The egregiousness of the Teamsters fraud is heightened by, among other facts, the unnecessary establishment of over 200 pension plans with (until recently) no practical rights of portability or reciprocity, the establishment of 20 year vesting rules for the rank and file (in contrast to a five year vesting rule for officers of the international union), and the diversion of monies held in trust from their lawful purposes. See generally PROD, *Teamster Democracy and Financial Responsibility* (1976).

⁴ The *amicus* memorandum has thus misread the opinion below if it infers that the court of appeals would in all circumstances require disclosure of the actuarial probability of ever receiving a pension benefit or disclosure of any other particular fact. First, the only issue before the court of appeals was whether the antifraud rules of the federal securities laws were applicable, and not what disclosures were required. Second, the remarks of the court of appeals as to what should have been disclosed were made within the context of the deceptive and misleading statements made by the Teamster defendants in the instant case.

memorandum point out that certain types of employee pension plans are, concededly, not only subject to the federal securities laws, but also must qualify under Section 401 et seq. of the Internal Revenue Code and meet the requirements of ERISA. Pet. Local 705 App. p. 45 n.54. It is thus not surprising that the Chairman of the SEC has concluded that:

"I do not believe that the antifraud provisions will have [such] adverse consequences . . ., either in terms of cost or in terms of uncertainty." Letter from SEC Chairman Williams to Senator Williams dated January 5, 1978.

Because the antifraud rules only require that any disclosure that is made be done so truthfully, they "do not impose an undue burden on anyone . . ." Mundheim and Henderson, *Applicability of the Federal Securities Laws to Pension and Profit Sharing Plans*, 29 *Law and Contemp. Prob.* 795, 814 (1964). Consequently, the matters raised in the *amicus* memorandum do not support certiorari review by this Court of the unanimous court of appeals decision below.

Respectfully submitted,

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